

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

02/19/2002

CLERK OF THE COURT  
FORM V000A

HONORABLE MICHAEL D. JONES

P. M. Espinoza  
Deputy

CV 2001-021150

FILED: \_\_\_\_\_

LARRY H MILLER LEASING

SCOTT A MALM

v.

THOMAS HENDRIX, et al.

NICHOLAS E VAKULA

BUCKEYE JUSTICE COURT  
REMAND DESK CV-CCC

MINUTE ENTRY

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A). Appellee's request for Oral Argument contained in their response to Appellant's Opening Memorandum dated January 10, 2002, is denied as unnecessary. The Court has considered the file of the Buckeye Justice Court, the exhibits made of record, and the memoranda of counsel.

This appeal concerns the trial court's attorneys' fees determinations after a mixed jury verdict. Three separate findings were made by the trial judge:

1. That Appellant, Larry H. Miller Leasing, was not entitled to an award of attorney's fees on its breach of lease agreement claim pursuant to paragraph 20 of the Vehicle Lease Agreement dated September 27, 1997;<sup>1</sup>

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<sup>1</sup> Plaintiff's Exhibit #1.  
Docket Code 512

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2. That Appellees, Thomas and Diane Hendrix, were prevailing party within the meaning of A.R.S. Section 12-341.01(A); and

3. That Appellees, Thomas and Diane Hendrix, were entitled to an award of attorneys' fees in the amount of \$12,500.00.

Generally, the denial of attorneys' fees is within the discretion of the trial court, and this court will not overrule such a decision of if it is reasonably supported by the record.<sup>2</sup> The trial court's denial of attorneys' fees is reviewed under an abuse of discretion standard.<sup>3</sup> However, unlike fees awarded under A.R.S. Section 12-341.01(A), the court lacks discretion to refuse to award fees under a contractual provision.<sup>4</sup>

Appellant/Plaintiff below, Larry Miller (hereinafter Appellant) provided on its claim against Appellees/Defendants-Counterclaimants below, Thomas and Diane Hendrix (hereinafter Appellees) for breach of the subject lease agreement. Appellant was awarded the full amount of its claim by the jury. Confusion arose due to the forms of verdict submitted to the jury. Appellant sued Appellees for breach of the subject lease agreement. Appellees counterclaimed against Appellant for breach of subject lease agreement, negligent misrepresentation, breach of the covenant of good faith and fair dealing, and consumer fraud.<sup>5</sup> Five (5) forms of verdict were submitted to the jury. The first related to Appellant's claim for breach of the subject lease agreement. The second related to Appellees' counterclaim for breach of the subject lease agreement. They read, respectively:

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<sup>2</sup> West v. Salt River Agr. Imp. & Power, 179 Ariz. 619, 626, 880 P.2d 1165 (App.1994); Johns v. Dept. of Economic Sec., 169 Ariz. 75, 81, 817 P.2d 20 (App. 1991).

<sup>3</sup> Granville v. Dodge, 195 Ariz. 119, 131, 985 P.2d 604 (App. 1999)

<sup>4</sup> Chase Bank of Arizona v. Acosta, 179 Ariz. 563, 575, 880 P.2d 1109 (App. 1994).

<sup>5</sup> Other causes of action were plead in Appellees' counterclaim, but were not submitted to the jury.

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We, the Jury, duly empanelled and sworn in the above entitled action, upon our oaths, with respect to the Plaintiff's [Appellant's] claim that Defendants Hendrix [Appellees] breached the lease agreement, do find in favor of Plaintiff [Appellant] and find their [sic] full damages to be \$\_\_\_\_\_.

We, the Jury, duly empanelled and sworn in the above entitled action, upon our oaths, with respect to the Defendant's [sic] [Appellees'] claim that Plaintiff Larry Miller [Appellant] breached the lease agreement, do find in favor of Defendants Thomas and Diane Hendrix [Appellees] and find the full damages to be \$\_\_\_\_\_.

The language in the body of each form of verdict only permitted a finding in favor of the party bringing the claim.<sup>6</sup>

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<sup>6</sup> I suggest that in the future the trial judge utilize verdict forms which would clarify the jury's decision on each claim. For example, the verdict forms above have respectively:

We, the Jury, duly empanelled and sworn in the above-entitled action, upon our oaths, with respect to the Plaintiff's claim that Defendants Hendrix breached the lease agreement, do find in favor of:

Plaintiff and find its full damages to be \$\_\_\_\_\_; or

Defendants \_\_\_\_\_ ...

We, the Jury, duly empanelled and sworn in the above-entitled action, upon our oaths, with respect to the Defendant's claim that Plaintiff Larry Miller breached the lease agreement, do find in favor of:

Defendants and find their full damages to be \$\_\_\_\_\_; or

Plaintiff \_\_\_\_\_

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The jury signed each form of verdict submitted (as it was required to do so as to render a judgment on all claims) and awarded Appellant \$4,567.15 plus 18% interest on its claim, and awarded Appellees \$0.00 on their counterclaim.<sup>7</sup>

While Appellees characterize the latter determination to be a verdict in their favor on their counterclaim, this Court disagrees.<sup>8</sup> The jury had no choice but to sign this form of verdict in the form it was given because it was the only one pertaining to Appellees' breach of lease agreement counterclaim. The awarding of \$0.00 compels the conclusion that its verdict on this counterclaim was, in fact, in favor of Appellant. Thus, read together, forms of verdict 1 and 2 determine that Appellant was the successful party on the respective breach of lease agreement claims.

The Vehicle Lease Agreement dated September 27, 1997,<sup>9</sup> provides, in pertinent part:

20 ...If you hire an attorney to collect what I owe or to enforce your rights, I will pay the attorneys' actual fee and any court costs...

This attorneys' fees provision is contractual and mandatory. When a contract has an attorney's fees provision, it

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<sup>7</sup> The jury similarly awarded Appellees \$0.00 on their counterfraud counterclaim. Notably, Appellees neither recite that the jury found in their favor on this claim in its description of the jury verdict, nor do they attach this form of verdict to exhibit #4. See Appellee's response to Appellants opening memorandum at page, lines 1-8, and exhibit 4 thereto.

<sup>8</sup> In fact, Appellees requested that the jury verdict in favor of Appellant on its breach of lease agreement claim be vacated. Appellees, however, did not cross-appeal pursuant to Rule 9(a). Accordingly, this court has no jurisdiction to consider any affirmative relief sought by Appellees. In light of this court's finding as to the Regal effect of Jury Verdict Forms 1 and 2, however, any such properly raised request would have been denied.

<sup>9</sup> See fn.1.

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controls to the exclusion of A.R.S. Section 12-341.01(A).<sup>10</sup> The trial court abused its discretion in failing to award Appellant its contractually mandated reasonable attorneys' fees<sup>11</sup> relating to its successful breach of lease agreement claim and its successful defense of Appellees' breach of lease agreement counterclaim.

Upon the reading and recording of the jury's verdicts, the trial court determined that Appellees were the prevailing party under A.R.S. Section 12-341.01(A). A trial court's decision to award attorneys' fees to a prevailing litigant in a contract dispute is reviewed using an abuse of discretion standard.<sup>12</sup> A trial court has the discretion to determine who is the prevailing party when multiple claims are brought with varied success,<sup>13</sup> under either of various tests<sup>14</sup>. While the Court does not now determine that the trial court abused its discretion in determining that Appellees were the prevailing party, the trial court made its determination in the absence of the finding that Appellant prevailed as to the breach of lease agreement claims. The trial court must make a determination of this issue.

IT IS THEREFORE ORDERED vacating the attorneys' fees and costs award in this case.

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<sup>10</sup>Lisa v. Strom, 183 Ariz. 415, 418, fn.2, 904 P.2d 1239 (App.1995); Sweis v. Chatwin, 120 Ariz. 249, 253, 585 P.2d 269 (App.1978).

<sup>11</sup> Even though the contractual attorneys' fees provision provides that the "attorneys' actual fee" will be paid, the court can, and indeed must, consider whether fees requested pursuant to the parties' contract are reasonable. ABC Supply, Inc. v. Edwards, 191 Ariz. 48, 55, 952 P.2d 286 (App. 1997).

<sup>12</sup> Radkowsky v. Provident Life & Acc. Ins. Co., 196 Ariz. 110, 113, 993 P.2d 1074 (App. 1999).

<sup>13</sup> City of Cottonwood v. James L. Fann Contracting, Inc., 179 Ariz. 185, 194-195, 877 P.2d 284 (App. 1994).

<sup>14</sup> Schwartz v. Farmers Insurance Company of Arizona, 166 Ariz. 33, 38, 800 P.2d 20 (App.1990).

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This case is remanded back to the Buckeye Justice Court with the following instructions:

- 1) The trial court shall determine if Appellant was the prevailing party on the breach of lease claim.
- 2) Appellant shall submit an application for attorneys' fees and statement of costs with respect to the breach of lease agreement claims. The trial court shall determine which reasonable fees relate to the breach of lease agreement claims and award the same to Appellant.
- 3) The trial court is to determine who is the prevailing party in this litigation within the meaning of A.R.S. Section 12-341.01(A). If the trial court determines that Appellees are the prevailing party, then,
- 4) Appellees shall resubmit their application for attorneys' fees and statement of costs. The trial court after briefing, is to exercise its sound discretion and determine which fees, if any, are properly awardable pursuant to A.R.S. Section 12-341.01(A), and award the same to Appellees, after making an offset for any fees Awarded to Appellant.

Appellant also raises the issue of a mathematical error in determining the interest portion of the judgment. The trial court calculated \$753.58 as and for the interest due Appellant on the breach of lease agreement verdict in its favor. Appellant's calculation of \$822.09 is erroneous as this reflects 18% interest on \$4,567.15 for a full year. However, the applicable time period is from November 1, 2000 through October 10, 2001, a period of 344 days for which the applicable interest is \$758.67. The judgment is ordered modified to \$757.68 to

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reflect this recalculation (\$4,083.50 +\$2,000.00 -\$5325.82  
=\$757.68).

IT IS ORDERED remanding this case to the Buckeye Justice  
Court for further proceedings consistent with this opinion.